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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 944

LA SALLE STEEL COMPANY, a corporation,
Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 9, 1957.

OPINIONS BELOW.

The first opinion of the District Court (A. 120-121), printed in Appendix B hereto, *infra*, p. 3a, is reported in 140 F. Supp. 353. The second opinion of the District Court (A. 138), filed in response to a petition for clarification of the District Court's first opinion, is unreported and is printed in Appendix B hereto, *infra*, p. 5a. The opinion

of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 6a, is reported in 250 F. 2d 607 (Adv. Shts. No. 3, Feb. 24, 1958).

JURISDICTION.

The Judgment of the Court of Appeals was entered on December 9, 1957. A timely petition for rehearing, filed December 24, 1957, was denied on February 7, 1958. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Whether the Trading with the Enemy Act empowers the Alien Property Custodian to collect, by summary process, disputed monetary claims accruing to him in his capacity as the legal owner of property being administered under that Act.

STATUTE INVOLVED.

The Statutory provisions involved are Sections 5(b), 7(c) and 12 of the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. §§ 5(b), 7(c), 12. They are printed in Appendix A, *infra*, pp. 1a, 2a.

STATEMENT.

This is a summary proceeding brought under the Trading with the Enemy Act to obtain enforcement of a "turnover directive" requiring the defendant to pay certain royalties allegedly due the plaintiff as successor to the Alien Property Custodian.*

* In 1946, the Attorney General of the United States, by virtue of Executive Order 9788 (11 F. R. 11981, October 15, 1946), succeeded to all the powers, functions and duties of the Alien Property Custodian and, therefore is the plaintiff. As used herein, the term "plaintiff" refers to both the Alien Property Custodian and to the Attorney General as Successor to the Alien Property Custodian.

On December 2, 1933, the defendant entered into a patent license agreement with Tubus A.G., a Swiss corporation (Exhibit A to the Complaint) (A. 6). As to certain extruded products, the license was exclusive and La Salle was granted the power to sublicense. As to all other products, the license was nonexclusive (A. 7-8).

The defendant agreed to pay Tubus A.G. royalties on all products produced in accordance with the practice of the inventions so licensed, including $13,750.00 as advance royalties to be credited against initial production, which sum was in fact advanced at the time of the making of the agreement (A. 3, 8-9).

Only the exclusive license and the right to sublicense were of value. The defendant itself never produced under either the exclusive or nonexclusive licenses, but in 1936 entered into a sublicense agreement with Wilcox-Rich Corporation (A. 71-72). On January 1, 1948, the defendant granted a sublicense to Thompson Products, Inc., and on February 1, 1948, to Eaton Manufacturing Company. The 1948 sublicense agreement with Eaton Manufacturing Company also terminated the 1936 sublicense agreement with Eaton's predecessor, Wilcox-Rich Corporation (A. 73-74). During the years 1936 to 1945, and 1948 to 1950, the defendant received substantial sums in royalties under these sublicense agreements (A. 74).

By vesting order No. 3369, made March 29, 1944 (Exhibit B to the Complaint) (A. 15), the Alien Property Custodian found that all interest and rights (including all royalties and other moneys payable or held with respect to such interests and rights, and all damages for breach of the agreement hereinafter described, together with the right to sue therefor) created in Tubus A.G. by virtue of said agreement dated December 2, 1933, by and between

Tubus A.G. and the defendant, and the patents therein covered, were the property of Fritz Singer and the heirs of Neumeyer, and that the said Fritz Singer and heirs of Neumeyer were residents and nationals of Germany.

In March of 1944, when the vesting order was made, there were no royalties whatever due and unpaid to Tubus A.G., nor any accrued to it or held by the defendant for it under said agreement of December 2, 1933 (see exhibit to letter of February 21, 1952, from the plaintiff to the defendant) (A. 102).

During the year 1945 a competitor of the defendant's then sublicensee began to infringe one of the patents covered by the 1933 agreement. When the defendant was no notified by its sublicensee, it decided to initiate suit for infringement and requested the plaintiff to join in such action as required by Section 14 of the 1933 agreement. The plaintiff refused. (A. 26-27, 72) The plaintiff also advised the defendant that if it brought such a suit, he would intervene against it (A. 28). In this connection the plaintiff raised, for the first time, the contention which forms the basis for the defendant's first affirmative defense—that the 1933 license agreement was illegal under the antitrust laws (A. 28-29).

On April 17, 1950, the plaintiff notified the defendant that the 1933 agreement was terminated as of January 30, 1950. On the latter date, the defendant, as required by law, had reported to the plaintiff the quantity of extruded valves and tappets that had been produced, and calculated the royalties as amounting to $12,081.59, a sum less than the $13,750.00 which it had paid to Tubus as advance royalties (A. 5). The defendant's royalty computations were based on the production which its sublicensees had reported to it and on which they had paid royalties (A. 73-74).

On February 21, 1952, by letter to La Salle, the plaintiff sent the defendant his calculation showing the total sum of $21,377.29 due and unpaid for royalties, and demanded that the defendant remit the same on or before March 15, 1952. This is the letter which the plaintiff and the trial court said "res vested" the royalties in question (A. 99, 102).

The statement accompanying said letter shows that from the beginning through the year 1947 all royalties payable under the 1933 agreement were fully paid by the advance deposit of $13,750.00, made with Tubus, and that all of the royalties involved in the proceeding allegedly accrued during the years 1948, 1949 and 1950 (A. 102).

The complaint sought a personal judgment against the defendant for $21,377.29 "together with interest thereon". (A. 6). The complaint was devoid of any representations that the plaintiff's letter of February 21, 1952 had effected a "res vesting" of the sum claimed by the plaintiff (A. 2-6).

The defendant answered and put in two affirmative defenses, the *first*: Illegality of the contract of December, 1933, because it violated Sections 1 and 2 of the Sherman Act for reasons assigned in paragraph 21 of the answer (A. 23-25); the *second*: Invalidity of the patents (A. 25).

The defendant also filed a counterclaim. The first count sought damages for breach of contract by reason of the failure of the plaintiff to join, as required by Section 14 of the 1933 agreement, in the patent infringement suit which the defendant had sought to initiate; the second count sought recovery, pursuant to Section 15 of the 1933 agreement, of five percent of any and all moneys received by the licensor from any source as royalties under the contract (A. 26-28).

The responsive portion of the defendant's answer also put in issue the actual production, by defendant's sublicensees, under patents covered by the 1933 agreement (A. 23).

The plaintiff challenged the affirmative defenses, moving to strike them on the ground that they "failed to state a legal defense to the claim set forth in plaintiff's complaint herein" (A. 29-30). Subsequently, plaintiff also filed a reply to defendant's counterclaim (A. 122-123).

Plaintiff's initial briefs in support of his motion to strike did not assert that this was a summary proceeding to enforce a "res vesting" of the royalties in dispute (A. 31-41, 62-70). However, in his third brief on the motion to strike he did assert for the first time, that the action was summary, (A. 94), and set forth as an exhibit to the brief the letter of February 21, 1952, demanding that the defendant pay the royalties in question (A. 99). His brief maintained that by virtue of the initial vesting order of March, 1944, as supplemented by the letter of February, 1952, a "res vesting" in respect of said royalties had been accomplished, such as would support a summary action, under Section 17 of the Trading with the Enemy Act, to enforce such seizure (A. 94, 95).

The district court granted plaintiff's motion to strike the affirmative defenses (A. 120-121). However, the court's memorandum was ambiguous as to whether it viewed the proceeding as a summary one, and defendant petitioned for clarification of the court's memorandum (A. 124-132). The trial court clarified its first opinion and held that in deciding the motion to strike the defense that the fund arose out of an unenforceable agreement it considered that the plaintiff "here was attempting to enforce a turnover demand for a vested fund" (A. 138). That is to say,

the trial court held that the $21,377.29 in dispute had constituted a fund subject to seizure under the Act, that the plaintiff had effectively "res vested" or seized the fund, and that proceeding was a summary one to enforce compliance with that seizure.

Thereupon, the court struck the defendant's answer and counterclaim and ordered it to comply with the vesting order and turnover demand issued pursuant thereto by paying the sum of 21,377.29 to the plaintiff (A. 139).

On Appeal by the defendant, the Court of Appeals affirmed.

In its appeal to the Court of Appeals, the defendant made these separate and independent points:

1. The Trading with the Enemy Act authorizes summary seizure only of the royalties due or held for the alien at the time of the seizure and not those which may become due to the plaintiff *after* his seizure of all of the alien's interests and rights.

2. Even if the Trading with the Enemy Act could be so construed as to permit seizure of the royalties in question, nevertheless, the purported seizure of February, 1952, was invalid since, on October 19, 1951, the power to take such action was withdrawn by the Joint Resolution which terminated the state of war between the United States and the Government of Germany without any saving clause applicable to the facts in the instant case.

The first of the above contentions was rejected by the Court of Appeals in apparent reliance upon *Zittman* v. *McGrath*, 341 U.S. 446, and *Zittman* v. *McGrath*, 341 U.S. 471.

The second of the above points is not pressed on this petition and is no longer an issue in the case.

REASONS FOR ALLOWANCE OF THE WRIT.

As indicated above, all of the royalties in question accrued, according to the plaintiff's own statement of claim (A. 102), many years after the seizure, in March 1944, of all of the rights and interests of Tubus A.G. under the 1933 agreement and in and to the patents underlying that agreement.

Once the plaintiff has vested property under the Trading with the Enemy Act, he is the owner of it. The enemy alien from whom it is seized no longer possesses any interest whatsoever, either in the property seized or in the claims which may arise, subsequent to seizure, as an incident to such ownership. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 56; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-121. Accordingly, all claims to such royalties belonged to the plaintiff from the very moment such claims first arose. It cannot be said that such claims were ever owned by, or owing to, Tubus or any other alien or enemy.

It follows that the royalties in question were never subject to summary seizure, as contended by plaintiff. The summary seizure powers of the plaintiff, under Sections 5(b) and 7(c) of the Act, are strictly limited to alien or enemy owned property. Section 5(b) authorizes the seizure of "any property or interest of any foreign country or national thereof . . ."; Section 7(c) authorizes the seizure of "property . . . rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy . . ."

This conclusion is supported by the basic distinction, in the Trading with the Enemy Act, between the powers given the plaintiff in connection with the seizure of enemy or alien owned property and those given him in connection with the administration of property seized under that Act.

The plaintiff has the authority, under Sections 5(b) and 7(c) of the Act, to determine that money or property is enemy owned, and, in a summary proceeding, to compel those in possession to pay or deliver such fund or property to him. Those contesting his determination of enemy ownership, or claiming an interest in the fund or property, are relegated to a proceeding under Section 9(a) of the Act (50 U.S.C. App., § 9(a)) to recover it or to establish their interest therein. See Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 Harv. L. Rev. 721, 726-731 (1949).

Although broad in scope, the powers granted to the plaintiff in connection with the administration of seized property are very different from those granted by Sections 5(b) and 7(c). Section 12 of the Act provides that the plaintiff

> "shall be vested with all the powers of a common-law trustee in respect of all property . . . conveyed, transferred, assigned, delivered or paid over to him in pursuance of the provisions of this Act . . . and . . . shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof, by sale or otherwise, and exercise any rights or powers which may or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof . . ."

The section authorizes the plaintiff to institute regular civil proceedings to enforce such rights or claims, contractual or otherwise, which may accrue to him as the owner of property which he is administering under the Act. There is nothing in this section which authorizes the plaintiff to enforce such rights or claims by summary process.

The instant case is plainly and simply one arising in connection with the administration of property which the plaintiff had previously seized under Sections 5(b) and 7(c), and which he was administering under Section 12. There is in dispute the amount of production, under a patent covered by the 1933 license agreement, during a period when the plaintiff was the sole owner of the patent and of the licensor's rights under that agreement. There is also in issue, by way of both negative defense and counterclaim, a contention that the plaintiff breached the license agreement, upon which his claim is predicated, by certain action which he himself took after he had succeeded to the interest of the licensor thereunder. There is further in dispute, by way of affirmative defense, a point of law which was first interjected into the relations of the parties hereto by the plaintiff after he had become the owner of the licensor's interest in the license agreement.

The defendant respectfully submits that there is nothing in the Trading with the Enemy Act which empowers the plaintiff to dispose of this case by unilaterally determining the amount in dispute and then collecting that amount, as if it were a "fund" subject to seizure, in a summary proceeding in which the defendant is barred from presenting either defense or counterclaim. But that is exactly what the plaintiff is seeking to accomplish in this case.

This issue involves an important question of Federal law never before considered by this Court. If the plaintiff's position is sustained, there is no discernible distinction between the plaintiff's summary seizure powers under Sections 5(b) and 7(c), and his administrative powers under Section 12. Any person dealing with the plaintiff as the administrator of seized property will do so at the risk that the plaintiff will be able to collect any sum in dispute through summary seizure process, relegating the other party to a suit for refund under Section 9(a).

The plaintiff has seized hundreds of millions of dollars worth of property under the Trading with the Enemy Act. The property seized, and administered, by the plaintiff under that Act include patents, stocks and bonds, real estate and entire businesses. See Fallon, *Enemy Business Enterprises and the Alien Property Custodian*, 15 Ford. L. Rev. 222, 224 (1946). Many persons have dealt and will deal with the plaintiff as the administrator of such property. It is vital that those dealing with him know whether the powers granted by Sections 5(b) and 7(c) are limited to the initial seizure of enemy or alien property, or whether they may also be invoked by the plaintiff to determine disputes arising in the course of his administration of property seized under the Act.

The decision of the Court of Appeals would also appear to be contrary to the decision of the Court of Appeals for the Second Circuit in *In re Sutherland*, 23 F. 2d 593, 599. In that case the Alien Property Custodian (Sutherland) had "res vested" certain shares of Eastman Kodak Company stock. The Custodian brought a summary proceeding under Section 17 of the Trading with the Enemy Act, against the Company to obtain possession of the shares and also to recover dividends declared on them *subsequent* to the vesting order. The trial court ruled in favor of the Custodian. The Court of Appeals reversed as to the dividends. It held that the Custodian might not recover, in a summary proceeding, dividends declared subsequent to the vesting order by which he had optained title to the stock. The Court said (p. 599):

> "All that the Custodian may seize is what the President was authorized after investigation to seize, namely, that which was owing or belonging to the alien. The President was not given the power to require the delivery to him of money or property not then owing, but which might become owing in the future."

Moreover, the reliance by the Court of Appeals on *Zittman* v. *McGrath*, 341 U.S. 446 (*Zittman* 1), and *Zittman* v. *McGrath*, 341 U.S. 471 (*Zittman* 2), is misplaced. Neither case is in point. In *Zittman* 1 this Court held that an attaching creditor's lien against a bank account was good as against a "right, title and interest" vesting order of the Alien Property Custodian, and that the Custodian had taken the interest of the alien in the account subject to such liens. In *Zittman* 2 the facts were the same, except that there the Custodian had also, by a turnover directive, "res vested" the entire bank account. This Court held that the Custodian, under those circumstances, was entitled to possession of the fund, and that the attaching creditors were relegated to their rights under Section 34 of the Trading with the Enemy Act.

At most the *Zittman* cases reaffirm the old rule that a "right, title and interest" vesting order, by which the plaintiff seizes such interest as an alien may have in a certain fund or property, does not bar a subsequent "res vesting" by which the plaintiff can obtain, through a summary proceeding, possession of the entire fund or property. Phrased somewhat differently, the issuance by the plaintiff of a right, title and interest vesting order is not such a binding election of remedies as will preclude a later "res vesting" order. See also *Brownell* v. *Singer*, 347 U.S. 403; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *In re Daly's Estate*, 189 Misc. 680; 74 N.Y.S. 2d 711; *In re Young's Estate*, 204 Misc. 92, 118 N.Y.S. 2d 803, 808, 809. However, the defendant has never disputed this proposition. It maintains, on the contrary, that for the reasons stated above, the royalties in question were never subject to seizure under Sections 5(b) and 7(c) of the Act, whether such seizure was by "right, title and interest" vesting order, "res vesting" order, or both.

CONCLUSION.

For the foregoing reasons, we submit that this petition should be granted, and that this Court's writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

VINCENT O'BRIEN,
Attorney for Petitioner.

APPENDIX A.

STATUTE INVOLVED.

TRADING WITH THE ENEMY ACT.

"Sec. 5(b)(1) . . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . ." 40 Stat. 415; 50 U.S.C. App. § 5(b).

"Sec. 7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act (sections

1-6 and 7-39 of this Appendix) . . ." 40 Stat. 416; 50 U.S.C. App. § 7(c).

"Sec. 12. . . . The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act (said sections), and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: . . ." 40 Stat. 423, 50 U.S.C. App. § 12.

APPENDIX B.

OPINIONS BELOW.

HERBERT BROWNELL, Jr., Attorney General of the United States as successor to the Alien Property Custodian, Plaintiff

v.

LA SALLE STEEL CO., Defendant.

No. 55 C 263

United States District Court
N.D. Illinois, E. D.
Feb. 10, 1956.

KNOCH, *District Judge.*

This matter came on to be heard on plaintiff's motion to strike the two affirmative defenses set forth in defendant's answer as failing to state a legal defense to the claim set forth in plaintiff's complaint.

This action is brought under the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 *et seq.*, to secure a fund of accumulated royalty payments in possession of defendant. In its answer defendant as affirmative defenses states that the fund sought by plaintiff arose out of an unenforceable patent license agreement, which by its terms violated the anti-trust laws; and that the patent of which defendant was made a licensee is invalid.

The Court has had the benefit of extensive argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited and is fully advised in the premises.

The Alien Property Custodian (or his successor) is not a mere assignee for value who is seeking to enforce a contract, and therefore vulnerable to all defenses available against the alien whose property and interests have been vested. It appears that the plaintiff's predecessor did vest this fund, by the original vesting order, supplemented by later turnover demand, *In re Yokohama Specie Bank, Ltd.*, 1946, 188 Misc. 137, 66 N.Y. S.2d 289, which plaintiff is attempting to enforce. The defense of illegality of the transaction out of which the fund arose is not available to the defendant against the plaintiff. *Kermath Mfg. Co.* v. *Brownell*, 6 Cir., 1955, 222 F. 2d 577, 580; *Standard Oil Co.* v. *Clark*, 2 Cir., 1947, 163 F. 2d 917.

It further appears that the facts alleged do not bring this case within the exception set out in *Sola Electric Co.* v. *Jefferson*, 1942, 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed. 165 (on which defendant relies) to avoid the general rule that a licensee may not contest the validity of the patent in an action for royalties.

Plaintiff's motion is therefore allowed.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 55 C 263) * *

SUPPLEMENTAL MEMORANDUM.

(Filed Aug 2 1956)

This matter came on to be heard on defendant's petition for clarification of this Court's Memorandum and Order granting plaintiff's motion to strike defendant's affirmative defenses.

The Court has carefully considered the petition, plaintiff's answer to it, defendant's reply and the questions therein raised.

It is true, as defendant asserts, and plaintiff admits, arguments were variously raised the numerous briefs which in turn suggested that plaintiff was bringing a summary proceeding to enforce turn over of vested property and also that plaintiff was proceeding to enforce the rights of a mere owner.

The first of these seemed predominant and the Court in deciding the motion to strike the defense that the fund sought arose out of an unenforceable agreement, considered that plaintiff here was attempting, in a summary proceeding, to enforce a turn over demand for a vested fund.

The second of the two affirmative defenses, the assertion of invalidity of the patent under which defendant was licensed, was considered to be vulnerable to a motion to strike under either theory.

Win G. Knoch
United States District Judge

Date: Aug. 2, 1956.

In the
UNITED STATES COURT OF APPEALS.
For the Seventh Circuit

No. 12003. September Term and Session, 1957.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian,
Plaintiff-Appellee,
v.
LA SALLE STEEL COMPANY, a Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 9, 1957

Before Major and Finnegan, *Circuit Judges*, and Platt, *District Judge*.

FINNEGAN, *Circuit Judge*. Relying on § 17 of the Trading with the Enemy Act,[1] plaintiff Attorney General of the United States as successor[2] to the Alien Property Custodian, brought this action to secure a fund of accumulated royalty payments ($21,377.29) in defendant's possession. In the Order brought up for review the district judge stated: ". . . defendant . . . conceded to the Court that if this is a valid summary proceeding to enforce a turnover

[1] 50 U.S.C. App. 17. Jurisdiction was also invoked under 28 U.S.C. § 1345.

[2] By Executive Order 9788 (11 F. R. 11981, October 15, 1946) the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

demand for a vested fund, defendant's answer and counterclaims should be stricken and plaintiff should have judgment for the amount claimed. . . . " Those pleadings were stricken on plaintiff's motion, judgment[3] was entered for plaintiff, mandating defendant's compliance with plaintiff's Vesting Order No. 3369 and the turnover demand.

Obviously the factual background of this case must be drawn from pleadings, briefs of the parties in both courts and the exhibits. From those materials it appears fairly well undisputed that on December 2, 1933 defendant, LaSalle Steel Company, joined in a patent license agreement with Tubus A. G. of Switzerland by which LaSalle received the right to exploit certain inventions covered by patents and patent applications owned by Tubus. This was an exclusive license concerning the manufacture of certain types of extruded products to which LaSalle was given the right to sub-license. The license was non-exclusive as to all other products. LaSalle committed itself to pay Tubus royalties of $1.25 per ton on products produces under the exclusive license; the royalty rate to be increased under certain circumstances according to the formula contained in the contract. Tubus was paid $13,750 as advance royalties to be credited against initial production. LaSalle never produced under that contract, but sublicensed Wilcox-Rich Corporation in 1936 and its successor, Eaton Manufacturing Company, to produce products covered by the exclusive license. Wilcox was to pay royalties

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[3] Defendant, according to this order, was directed to pay over the funds 'without prejudice, however, to any of defendant's rights to bring suit or institute proceedings for the recovery of said sum after defendant shall have paid the same to plaintiff and without prejudice to any of plaintiff's rights to defend against such a suit or proceeding, and also without prejudice to defendant's right, if any, to appeal from said order and from this order and judgment.' "

of $10 per ton, and by the fall of 1945 Eaton had paid $55,000 in royalties.

By vesting Order 3369, as amended, dated March 29, 1944 the Custodian vested 'All right, title and interest in and to the patents (subject matter of 1933 agreement) . . . including . . . two-thirds (⅔) of all accrued royalties and two-thirds (⅔) of all damages and profits recoverable at law or in equity from any person, firm corporation or government for past infringement of said patents.' That order was based upon the finding that such property was owned by enemies, Fritz Singer and the heirs of Neumeyer, all residents and nationals of Germany.

The Tubus-LaSalle 1933 contract was terminated in 1950 by the custodian. When the custodian's vesting order issued (March 29, 1944) Tubus had no royalty claims against LaSalle and, such royalties apparently accrued during the years 1948-1950. It is these royalties that plaintiff claimed when he served the turnover demand on defendant in 1952. LaSalle tells us that the custodian made no findings that the royalties were owned by alien enemies and such a finding would be unsupportable since they accumulated after the initial vesting when Tubus had been ousted. But we think the Joint Resolution, dated October 19, 1951, authorized seizure of the fund of $21,377,29:

> "The state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy

Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, *including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued.* Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest." H.J. Res. 289, 65 Stat. 451.

These royalties, due sometime after December 31, 1946 were accruals stemming from contract rights held by Tubus when the custodian took over the property. Compare: *Zittman* v. *McGrath*, 341 U.S. 446 (1951), *Zittman* v. *McGrath*, 341 U.S. 471 (1951).

We think summary disposition of this matter in the district court was correct and the non-prejudicial reservation for defendant's benefit an equitable course of decision. LaSalle's failure to pay over the funds cleared the way for plaintiff's proceeding below.

There being nothing further deserving discussion in this opinion, the order and judgment appealed is affirmed.

AFFIRMED.